



# MEMO ENDORSED

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BY FACSIMILE

The Honorable James C. Francis IV  
United States Magistrate Judge  
Daniel Patrick Moynihan  
United States Courthouse  
500 Pearl Street - Room 1960  
New York, New York 10007-1312

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LEAD CASE 04 Civ 7922 (RJS)  
(JCF)  
DOCKET IN ALL RNC CASES

*Re:* Consolidated RNC Cases

Dear Judge Francis:

Defendants request the Court's approval to take the depositions of non-party witnesses likely to testify at trial or on summary judgment. Specifically, after conferring with plaintiffs, the parties in several RNC cases have agreed to proceed with the depositions of non-party witnesses as set forth below and seek the Court's permission.

By way of background, pursuant to the Court's order, the parties identified non-party witnesses who have not been deposed that they are likely to rely upon at trial or on a motion for summary judgment. These letters were exchanged on or about April 4, 2008. This was the first time, in this litigation, that such information was exchanged. In all RNC cases, defendants identified 21 witnesses and plaintiffs identified a total of 197 witnesses. During the ensuing weeks, the parties conferred about the expected testimony of these witnesses and consent to take their depositions.

Counsel in Kyne,<sup>1</sup> Karlin and Meehan, have agreed to proceed with the depositions of the non-party witnesses listed in their April 4, 2008 letters. Mr. Fogel, counsel in Banno and Conley, has agreed to proceed with the depositions of some, but not all, of the witnesses listed in his April 4<sup>th</sup> letter. Mr. Rothman has also agreed to proceed with the depositions of some, but not all, of the witnesses identified in his April 4<sup>th</sup> letter. Mr. Spiegel has agreed to proceed with

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<sup>1</sup> Except that defendants do not consent to the depositions of some non-parties listed by plaintiffs in the Kyne case, including but not limited to Michael A. Cardozo, Corporation Counsel of the City of New York.

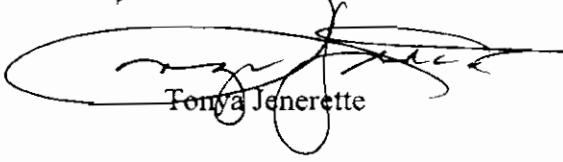
the deposition of Garth E. Kahl, one of two witnesses listed in his April 4<sup>th</sup> Letter.<sup>2</sup> Ms Ritchie is still considering the matter.<sup>3</sup> Defendants have agreed to proceed on similar terms with the depositions of non-party witnesses listed in our April 4<sup>th</sup> Letter with those counsel.

These depositions will not delay resolution of these cases. The parties will conduct the depositions in an expeditious manner, anticipate that each will be short in duration and that several can be completed on the same day. In addition, resolution will not be delayed because discovery is still proceeding on several tracks. For example, a number of plaintiffs have been scheduled for continued deposition testimony pursuant to court order; in several RNC cases the parties are awaiting court ordered medical and arrest records from various sources; briefing concerning intelligence issues is ongoing; the potential for additional discovery on the intelligence issues still exists; and expert discovery has not commenced. For these reasons, the depositions requested here will not delay resolution of these cases or otherwise prejudice any of the parties.

Furthermore, defendants will suffer severe prejudice if the application is denied. The prejudice to defendants is magnified here because the depositions of likely trial witnesses are at issue. Defendants need to know the content of their testimony prior to trial or filing of dispositive motions. Without that information, defendants are subject to ambush at trial, which is highly prejudicial to defendants, contrary to federal practice and a result that does not serve justice. See generally, *Patterson v. Balsamico*, 440 F.3d 104, 117 (2d Cir. 2006).

Accordingly, defendants respectfully request that the court grant this application so that the non party depositions consented to by the parties may proceed.

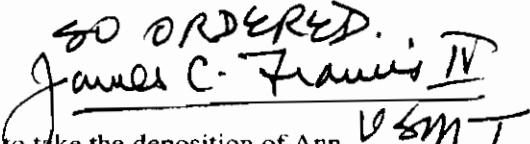
Respectfully submitted,



Tonya Jenerette

-7/11/08

Application granted. These depositions shall be completed by September ~~30~~ 2008.

so ORDERED.  
  
 James C. Francis IV  
 VSMJ

<sup>2</sup> Mr. Beck will be writing an application to the Court seeking permission to take the deposition of Ann Burns, the other witness listed in Mr. Spiegel's April 4<sup>th</sup> letter.

<sup>3</sup> In cases where plaintiffs have refused to consent to all or some of the depositions (or who have not responded), we will be seeking permission to proceed with those non party depositions in separate, case-specific letters to be filed shortly.